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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

E. I. DU PONT DE NEMOURS AND COMPANY,

Plaintiff,

v.

USA PERFORMANCE TECHNOLOGY, INC., PERFORMANCE GROUP (USA), INC., WALTER LIEW, and JOHN LIU,

Defendants.

Case No. 3:11-cv-01665-JSW

NOTICE OF MOTION AND MOTION TO STRIKE CERTAIN ALLEGATIONS IN AND EXHIBITS TO DEFENDANTS USA PERFORMANCE TECHNOLOGY INC. AND WALTER LIEW'S ANSWER AND COUNTERCLAIM TO PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: **July 1, 2011**
Time: **9:00 a.m.**
Before: **Honorable Jeffrey S. White**

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 1, 2011, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 11 of the above-entitled Court, the Honorable Jeffrey S. White presiding, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff E. I. du Pont de Nemours & Company ("DuPont") will bring on for hearing this motion to strike certain immaterial, impertinent and scandalous matter in the answer and

counter-claim submitted by defendants USA Performance Technology, Inc. and Dr. Walter Liew ("Defendants"). Specifically, DuPont asks the Court to strike allegations in Defendants' Answer regarding 1) DuPont's alleged anti-Chinese bias, and 2) DuPont's environmental record, as well as Exhibit F to Defendants' Answer.

This motion is submitted pursuant to Rule 12(f) of the Federal Rules of Civil and brought because Defendants' allegations regarding DuPont's alleged anti-Chinese bias and environmental record have no rational relationship to DuPont's claims or Defendants' counter-claims and solely exist to prejudice DuPont. Moreover, striking these spurious allegations now will avoid the time and expense that would be consumed were these issues required to be litigated.

This motion is based on this notice, the attached memorandum of points and authorities, DuPont's complaint, Defendants' answer and counterclaims, and other evidence and argument as may be presented before or at the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

1. Background

On April 6, 2011, , Plaintiff E. I. du Pont de Nemours & Company ("DuPont") filed this action to protect against the further misappropriation of its trade secrets relating to its titatanium dioxide ("TiO2") manufacturing process. On May 11, 2011, defendants USA Performance Technology, Inc. and Dr. Walter Liew ("Defendants") answered and counterclaimed against DuPont. Although Defendants "do not deny that DuPont's titanium technologies have been the subject of misappropriation" (Answer p. 5:11-12), they deny that they have done so, contending instead that any information they obtained from DuPont was publicly available, not DuPont's proprietary trade secret technology. *Id.* p. 6:17-18. DuPont will, in due course, show that Defendants' denials are false, and that they have indeed utilized DuPont's trade secrets. This motion, however, addresses Defendants' attempt to inject immaterial and scurrilous matter into the pleadings in this case—a tactic that independently reveals the improper devices employed by

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these Defendants. The Court should make clear that such tactics will not be tolerated in the federal courts. The motion to strike should be granted.

2. The Improper Matter

In response to DuPont's attempt to protect its intellectual property, Defendants assert that "DuPont attempts to mischaracterize Dr. Liew's citizenship because of its anti-Chinese bias, and for the purpose of inciting ill-based domestic prejudice against citizens of China" (Answer p. 2: 16-18). Such is neither an admission nor a denial; instead, it is groundless speculation regarding the motive behind DuPont's allegations. More troubling is Defendants' deliberate attempt to inject race into a case in which it is wholly irrelevant. The fact that DuPont objects to the misappropriation of its trade secrets and their sale to entities in China does not mean DuPont is anti-Chinese. It is, instead, anti-theft. This scurrilous allegation is improper and should be stricken.

Similarly, Defendants' allegations regarding DuPont's alleged environmental record are wholly immaterial to the issues in this case and are included to disparage DuPont. Specifically, Defendants allege that "China, like the rest of the world, is undoubtedly aware of the environmental problems caused by DuPont in the U.S. For example, in 2005 DuPont was sued by 1,995 people who claim dioxin emissions from DuPont's plant in DeLisle, Mississippi, caused their cancers, illnesses or loved one's death" (Answer p. 16:9-11). Defendants supplement their irrelevant pleadings by attaching a hit piece by the United Steelworkers International Union, criticizing DuPont for multitudinous alleged safety violations. *See* Exhibit F to Answer.[1] These allegations regarding DuPont's environmental record and this hit piece are immaterial to the issues in suit and should be stricken.

II. ARGUMENT

Rule 12(f) of the Federal Rules of Civil Procedure states that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FRCP 12(f). It is well-established that "[t]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by

[1] Ironically, in assailing DuPont's alleged lack of environmental stewardship, the document does note "DuPont's unique process" in producing TiO2 (Exhibit F at 17).

dispensing with those issues prior to trial." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010); *see also Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds* 510 U.S. 517, 534–535, 114 S.Ct. 1023, 1033 (1994) (upholding motion to strike on grounds that stricken allegations "created serious risks of prejudice to [plaintiff], delay, and confusion of the issues.") A matter is immaterial "if it has no essential or important relationship to the claim for relief pleaded. Matter is impertinent if it does not pertain and is not necessary to the issues in question in the case." *McArdle v. AT & T Mobility LLC*, 657 F.Supp.2d 1140, 1149 (N.D. Cal. 2009) (citing *Fogerty*, 984 F.2d at 1527) (striking affirmative defenses). A "'scandalous' matter improperly casts a derogatory light on someone, usually a party." *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005) (granting motion to strike five causes of action.)

Defendants' allegations regarding DuPont's alleged anti-Chinese bias and DuPont's environmental record are immaterial, impertinent, and scandalous and thus should be stricken. There can be no doubt that Defendants' spurious allegations have no relationship to the parties' competing claims for misappropriation of trade secrets, nor could they pertain to Defendants' claims for copyright infringement (third counter claim) or tortious interference with prospective economic advantage (fourth counterclaim). These allegations are simply an attempt to smear DuPont. They have no proper place in this case. Allegations that solely exist to prejudice DuPont and propagate confusion should be stricken. *See Fogerty*, 984 F.2d at 1527.

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III. CONCLUSION

For the foregoing reasons, DuPont respectfully requests that the Court grant its motion to strike allegations regarding DuPont's alleged anti-Chinese bias, DuPont's environmental record and Exhibit F to Defendants' Answer.

Dated: May 26, 2011

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